

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

APPELLANT PRO SE:

**GARY F. OTTO**  
Pendleton, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

GARY F. OTTO,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 84A01-0602-CV-83
	)	
PEGGY S. FOX,	)	
	)	
Appellee-Petitioner.	)	

---

APPEAL FROM THE VIGO SUPERIOR COURT  
The Honorable Christopher A. Newton, Judge  
Cause No. 84D04-0601-PO-41

---

**May 30, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Gary F. Otto appeals the trial court's ex parte order for protection. We reverse and remand with instructions.

## **Issue**

The dispositive issue is whether the trial court violated Otto's due process rights.

## **Facts and Procedural History**

Otto and Peggy Fox ("Fox") divorced in 1984. During their marriage, they had a son, Joseph Ray Otto, now twenty-five years old. In 2002, Otto was sentenced to eight years following a habitual traffic offender conviction. On January 3, 2006, while Otto was incarcerated, Fox filed with the trial court a petition for an order for protection and request for hearing. In the petition, she alleged that Otto had threatened to cause physical harm to her and that he placed her in fear of physical harm. That same day, without conducting a hearing, the trial court issued an ex parte order for protection against Otto, enjoining him from: (1) threatening to commit or committing acts of domestic or family violence, stalking, or a sex offense against Fox, her husband Jeff Fox, and her son, James Champion; (2) harassing, annoying, telephoning, contacting, or directly or indirectly communicating with Fox; and (3) going near Fox's residence, school, and/or place of employment and other specific places frequented by Fox and/or her family. Appellant's App. at 1-2.<sup>1</sup> The order, which is scheduled to expire on January 3, 2008, includes the following instruction:

---

<sup>1</sup> We remind Otto that pursuant to Indiana Appellate Rule 51(C), "[a]ll pages of the Appendix shall be numbered at the bottom consecutively[.]"

You have the right to request that a hearing be held on the issues of this case. You must request the hearing in writing within thirty (30) days of receiving this order. If requested, the court staff/clerk will provide you with the forms containing the required information you need to submit to obtain a hearing in this case.

*Id.* at 3. On January 12, 2006, Otto filed his motion for proper forms from court clerk to submit for respondent to obtain a hearing. That same day, the trial court denied his motion. Otto filed his Notice of Appeal with the trial court on January 27, 2006. On March 1, 2006, Otto filed with this Court a verified motion for an order compelling trial court clerk to complete clerk's record and to issue notice of completion. On March 20, 2006, the trial court clerk filed a notice of completion of clerk's record with this Court. On November 17, 2006, by order of this Court, the trial court clerk filed an amended notice of completion of clerk's record, clarifying the fact that no hearing was held before the trial court.

### **Discussion and Decision**

First, we note that Fox failed to file an appellee's brief. Therefore, we apply a less stringent standard of review. We may reverse the trial court's decision if Otto establishes *prima facie* error, which is error "at first sight, on first appearance, or on the face of it." *Painter v. Painter*, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002).

#### ***I. Due Process***

Article 1, Section 12 of the Indiana Constitution provides that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." A prisoner has a constitutional right to bring a civil action against persons who have injured him or her. *Sabo*

*v. Sabo*, 812 N.E.2d 238, 242 (Ind. Ct. App. 2004). Conversely, an incarcerated defendant has the due process right to defend himself in a civil action. *Id.* Otto alleges that the trial court erred by denying him “the due process opportunity to defend himself either in person, telephonically [sic], or by U.S. Mail[.]” Appellant’s Br. at 23. We agree.

Otto cites *Sabo* in support of his claim. In *Sabo*, the defendant was incarcerated at the time of the final hearing on his wife’s petition for dissolution. He filed a motion for transport, and when it was denied, he filed a motion for telephonic hearing, which was granted on the condition that his counsel arrange his participation with the prison. Shortly thereafter, his counsel withdrew. When the husband did not appear by telephone, the trial court conducted the hearing without him. In that case, we found that the trial court had erred by failing to provide the husband “a means by which to defend himself in the civil action.” *Sabo*, 812 N.E.2d at 246.

Prior to *Sabo*, this Court decided *Murfitt v. Murfitt*, 809 N.E.2d 332 (Ind. Ct. App. 2004), another dissolution case in which the husband was incarcerated at the time of the final hearing. He filed a motion requesting “alternative hearing methods[.]” which the trial court denied. *Id.* at 333. We concluded that the husband’s due process rights were violated and ordered the trial court to conduct another final dissolution hearing at which the husband could appear in some capacity.

In the instant case, the trial court’s ex parte order for protection included a statement informing Otto of his statutory right to a hearing on the petition. *See* Ind. Code § 34-26-5-10(a) (“[U]pon a request by either party not more than thirty (30) days after service of the order or modification, the court shall set a date for a hearing on the petition. The hearing

must be held not more than thirty (30) days after the request for a hearing is filed unless continued by the court for good cause shown. The court shall notify both parties by first class mail of the date and time of the hearing.”).

Otto filed his request with the trial court nine days after the order was issued, and yet the trial court denied his motion without explanation. At the very least, Otto has established prima facie error. “On the face of it,” the trial court violated Otto’s due process rights by denying him the opportunity to defend himself in this matter. Therefore, we reverse the trial court’s order denying Otto’s motion for hearing, and we remand for the trial court to schedule a hearing to occur within thirty days of the date of this opinion.

Reversed and remanded with instructions.

SULLIVAN, J., and SHARPNACK, J., concur.